IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 4993 OF 2004.

Balkrishna Yashwant Zankar & Anr. .... Petitioners.

versu.

Smt.Leelabai Damodhar Zankar
and others. .... Respondents.

Shri Uday Warunjikar for the Petitioners.

Shri R.V.More for the Respondents Nos.1 to 4.

CORAM : ABHAY S.OKA, J.

DATED : 8th December, 2004.

P.C.:

1. By order dated 15th June 2004 notice for final disposal was issued by this Court. Accordingly, I have taken up the Writ Petition for final disposal at admission stage.

2. The Respondents Nos.1 to 5 are the original Plaintiffs and the Petitioners and Respondent No.6 are the original Defendants. The suit filed by the Respondents Nos.1 to 5 has been decreed and an Appeal has been preferred by the Petitioners and the Respondent No.6 in the District Court. In the pending Appeal, an Application was made by the Petitioners under Order LXI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") for production of additional evidence. It is contended in the said Application that the suit filed by the Respondents Nos.1

to 5 being a suit for general partition, certain properties which could have been subjected to partition ought to have been included in the suit properties. Therefore, by the said Application permission was sought to produce 7x12 extracts and other documents pertaining to certain properties which according to the Petitioners should have been forming part of the suit properties. It is to be noted here that during the pendency of the suit, an Application for amendment of Written Statement was filed by the Petitioner No.1. The said Application for amendment was rejected by the trial Court. The order passed on the Applicant for amendment (Exh.71 in the trial Court) is also made subject matter of challenge in the Appeal filed by the Petitioners and the Respondent No.6.

3. Shri Warunjikar, the learned Counsel for the Petitioners submitted that the Petitioners were seeking to produce only 7x12 extracts and mutation entries and therefore, the Application ought to have been allowed by the Appellate Court. He submitted that no prejudice will be caused to the Respondents if the said application is allowed.

4. Shri More, the learned Counsel appearing for the Respondents Nos.1 to 5 submitted that the documents which the Petitioners are trying to produce could have been produced in the trial Court. He submitted that the

application does not disclose the reason for not filing the documents in the trial Court. He, therefore, submitted that no interference was called for.

5. The powers of the Appellate Court under Rule 27 of Order LXI of the said Code include power to allow production of documents which the Appellate Court require to be produced to enable it to pronounce judgment. The contention of the Petitioners is that the properties in respect of which the documents are sought to be produced ought to have been included in the suit properties. In the Application for Amendment of Written Statement which was rejected by the trial Court in proposed paragraph No.25, a contention was sought to be raised that all the joint family properties are not shown in the plaint. The challenge to the rejection of the said Application by the trial Court will be considered at the time of final hearing of the Appeal. In my view, when the Appeal is fixed for final hearing, the Appellate Court should have considered the merits of the said Application at the time of final hearing of the Appeal. Considering the controversy involved, in my opinion, the Application for additional evidence ought to have been heard and decided along with the Appeal.

6. Hence I pass the following order:

(a) The impugned Judgment and Order dated 22nd

March 2004 is quashed and set aside.

(b) The Appellate Court is directed to hear and decide the Application at Exh.64 made by the Petitioners along with the main Appeal.

(c) Considering the fact that the Appeal is of the year 1997, the Appellate Court will decide the Appeal as expeditiously as possible and preferably within a period of six months from today.

(d) All contentions of the parties on merits are kept open.

(e) Rule is made absolute in the above terms with no order as to costs.

(f) Parties and the concerned Court to act on the authenticated copy of this order.

Judge.